



Fast Track Proposed Regulation Agency Background Document

Agency name	State Air Pollution Control Board
Virginia Administrative Code (VAC) citation	Primary action: 9VAC5 Chapter 500, Exclusionary General Permit for Federal Operating Permit Program
Regulation title	Exclusionary General Permit for Federal Operating Permit Program
Action title	Repeal of Exclusionary General Permit for Federal Operating Permit Program (Revision H11)
Date this document prepared	September 11, 2011

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 14 (2010) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary (no more than 2 short paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes.

This regulation establishes procedures for facility owners to obtain authority to operate under a general permit in order to avoid the necessity of obtaining a permit required under Title V of the Clean Air Act.

The department proposes to repeal this regulation because the U. S. Environmental Protection Agency (EPA) policy under which this regulation operated has expired and the regulation is unusable.

Statement of final agency action

Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency taking the action, and (3) the title of the regulation.

On September 9, 2011, the State Air Pollution Control Board:

1. Authorized the department to promulgate the attached proposal for public comment using the fast-track process established in § 2.2-4012.1 of the Administrative Process Act for regulations expected to be non-controversial. The Board's authorization constituted its adoption of the regulation at the end of the public

comment period provided that (i) no objection to use of the fast-track process is received from 10 or more persons, or any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, and (ii) the Department does not find it necessary, based on public comments or for any other reason, to make any changes to the proposal.

2. Authorized the Department to set an effective date 15 days after close of the 30-day public comment period provided (i) the proposal completes the fast-track rulemaking process as provided in § 2.2-4012.1 of the Administrative Process Act and (ii) the Department does not find it necessary to make any changes to the proposal.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including General Assembly chapter numbers, if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the scope of the legal authority and the extent to which the authority is mandatory or discretionary.

Section 10.1-1308 of the Virginia Air Pollution Control Law (Title 10.1, Chapter 13 of the Code of Virginia) authorizes the State Air Pollution Control Board to promulgate regulations abating, controlling and prohibiting air pollution in order to protect public health and welfare. Written assurance from the Office of the Attorney General that the State Air Pollution Control Board possesses the statutory authority to promulgate the proposed regulation amendments is available upon request.

Promulgating Entity

The promulgating entity for this regulation is the State Air Pollution Control Board.

Federal Requirements

There are no federal requirements that mandated the promulgation of this regulation, and no federal requirements that prevent its repeal.

State Requirements

There are no state requirements that mandated the promulgation of this regulation, and no state requirements that prevent its repeal.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons the regulation is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

Federal operating permit requirements required under Title V of the Clean Air Act and implemented in 9VAC5 Chapter 80 largely apply only to sources with emissions that exceed specified levels and are thus major. To determine whether a source is major, not only are a source's actual emissions considered, but also its potential emissions. Thus, a source that has maintained actual emissions at levels below the major source threshold could still be subject to major source requirements if it has the potential to emit major amounts of air pollutants. However, such sources could legally avoid program requirements by taking federally-enforceable permit conditions which limit emissions to levels below the applicable major source threshold.

As the deadlines for complying with the Title V operating permit requirements approached, industry and state and local air pollution agencies became increasingly focused on the need to adopt and implement federally-enforceable mechanisms to limit emissions from sources that desire to limit potential emissions to below major source levels. In the case of Virginia, the board adopted a state operating permit program (9VAC5-80, Article 5) that was approved by EPA for this purpose, but implementation of that program became problematic due to the volume of sources affected.

The EPA remained concerned that even with expedited approvals and other strategies, sources might face gaps in the ability to acquire federally-enforceable potential to emit limits due to delays in state adoption or EPA approval of programs or in their implementation. In order to ensure that such gaps did not create adverse consequences for states or for sources, on January 25, 1995 EPA issued a memo announcing a transition policy for a period extending until January 25, 1997. Under this policy, exclusionary rules and general permits could be used to create simple, streamlined means to ensure that these sources with actual emissions below 50 percent of major source thresholds would not be considered major sources for the transition period. EPA extended the transition period in subsequent memos, but made clear that the transition period would not be extended past the December 31, 2000 expiration date of the EPA transition policy that was given in the final transition policy memo.

On April 24, 1997, the board adopted an exclusionary general permit program (9VAC5 Chapter 500, Exclusionary General Permit for Federal Operating Permit Program) to implement that EPA transition policy. By the December 31, 2000 expiration date of the EPA transition policy, all sources in Virginia that had obtained exclusionary general permits under that program had been issued state operating permits with federally enforceable emission limits, and were no longer subject to applicability as major sources under the federal operating permit program. And, as of that date, 9VAC5 Chapter 500 conflicted with federal and state regulatory requirements that all major sources (with respect to their potential to emit) apply for, and obtain federal operating permits. The purpose of this amendment to repeal Chapter 500 is to resolve that conflict and to remove the provisions of an unusable permit program.

Rationale for using fast track process

Please explain the rationale for using the fast track process in promulgating this regulation. Why do you expect this rulemaking to be noncontroversial?

Please note: If an objection to the use of the fast-track process is received within the 30-day public comment period from 10 or more persons, any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, the agency shall (1) file notice of the objection with the Registrar of Regulations for publication in the Virginia Register, and (2) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.

As of December 31, 2000 there were no more sources with exclusionary general permits, and the department had the capability to issue sufficient permits with federally enforceable emission limits under the new source review permit programs or the state operating permit program to meet any affected source's need to be excluded from the federal operating permit program. Because there are no sources with Chapter 500 exclusionary general permits and applicability under an exclusionary general permit will no longer protect a source from applicability under the federal operating permit programs, there is no stakeholder group that is likely to object to repeal of the regulation. The use of the fast track process is therefore appropriate.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (Provide more detail about these changes in the "Detail of changes" section.)

9VAC5 Chapter 500, Exclusionary General Permit for Federal Operating Permit Program is repealed in its entirety: the definitions, general provisions, administrative procedures, permit terms and conditions, and forms. The repeal of Chapter 500 does not affect the provisions of the federal operating permit program (9VAC5-80, Articles 1, 2, 3 and 4).

Issues

Please identify the issues associated with the proposed regulatory action, including: (1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; (2) the primary advantages and disadvantages to the agency or the Commonwealth; and (3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please indicate.

1. Public: The primary advantage to the public is the removal of unusable and conflicting regulatory requirements, which improves the public's ability to understand and comply with regulatory requirements. There are no disadvantages to the public.
2. Department: The primary advantage to the department is the removal of regulations that are no longer necessary. There are no disadvantages to the department

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal which is more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.

The proposed regulation amendments to repeal 9VAC5 Chapter 500 Exclusionary General Permit for Federal Operating Permit Program are not more restrictive than applicable legal requirements.

Localities particularly affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

There is no locality which will bear any identified disproportionate material air quality impact due to the proposed regulation which would not be experienced by other localities.

Public participation

Please include a statement that in addition to any other comments on the regulation, the agency is seeking comments on the costs and benefits of the proposal, the potential impacts on the regulated community, and the impacts of the regulation on farm or forest land preservation.

In addition to any other comments, the Department is seeking comments on the costs and benefits of the proposal, the impacts on the regulated community, and impacts of the regulation on farm or forest land preservation. Also, the Department is seeking information on impacts to small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include (1) projected reporting, recordkeeping and other administrative costs, (2) probable effect of the proposal on affected small businesses, and (3) description of less intrusive or costly alternative methods of achieving the purpose of the proposal.

Anyone wishing to submit written comments may do so by mail, email, or fax to the staff contact listed below. Comments may also be submitted through the Public Forum feature of the Virginia Regulatory Town Hall web site at www.townhall.virginia.gov. Written comments must include the name and address of the commenter. In order to be considered, comments must be received by the last day of the public comment period. Commenters submitting faxes are encouraged to provide the signed original by postal mail within one week.

All comments requested by this document must be submitted to the agency contact: Gary Graham, Regulatory Analyst, Office of Regulatory Affairs, Department of Environmental Quality, P.O. Box 1105, Richmond, Virginia, 23218 (email gary.graham@deq.virginia.gov, fax 804-698-4510).

Regulatory flexibility analysis

Please describe the agency's analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: (1) the establishment of less stringent compliance or reporting requirements; (2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; (3) the consolidation or simplification of compliance or reporting requirements; (4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and (5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

An analysis of the proposal was completed for alternative regulatory methods that will minimize the adverse impact on small businesses without compromising health, safety, environmental and economic welfare.

With the repeal of 9VAC5 Chapter 500, the federal operating permit program (9VAC5-80, Articles 1, 2, 3, and 4) still meets all of the minimum requirements of the federal Clean Air Act, and 40 CFR Part 70 and does not differ materially from the pertinent EPA regulations. A failure to repeal any portion of 9VAC5 Chapter 500 could lead to confusion on the part of regulated businesses, individuals, and communities and would compromise the effectiveness of the federal operating program requirements in protecting the health and welfare of the public.

Economic impact

Please identify the anticipated economic impact of the proposed regulation.

<p>Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source / fund detail, and (b) a delineation of one-time versus on-going expenditures.</p>	<p>It is not expected that the repeal of this regulation will result in any cost to the Department.</p>
<p>Projected cost of the new regulations or changes to existing regulations on localities.</p>	<p>There are no projected costs to localities resulting from the repeal of this regulation.</p>
<p>Description of the individuals, businesses or other entities likely to be affected by the new regulations or changes to existing regulations.</p>	<p>Because exclusionary general permits are no longer useable for excluding individuals, businesses, or other entities from the federal operating permit program, there are no types of stakeholders that will be affected by the repeal of this regulation.</p>
<p>Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>	<p>Because there are no longer any sources with exclusionary general permits and because exclusionary general permits are no longer useable for excluding individuals, businesses, or other entities from the federal operating permit program, there are no individuals, businesses or other entities that will be affected by the repeal of this regulation.</p>
<p>All projected costs of the new regulations or changes to existing regulations for affected individuals, businesses, or other entities. Please be specific and include all costs. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses. Specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the proposed regulatory changes or new regulations.</p>	<p>Because the regulation is not in use, there are no projected costs of any kind to any individual, business or other entity resulting from the repeal of this regulation.</p>

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in §2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.

Alternatives to the proposed regulation amendments were considered by the Department. The Department determined that the first alternative is appropriate, as it is the least burdensome and least intrusive alternative that fully meets the purpose of the regulation. The alternatives considered by the Department, along with the reasoning by which the Department has rejected any of the alternatives being considered, are discussed below.

1. Repeal 9VAC5 Chapter 500 Exclusionary General Permit for Federal Operating Permit Program and thereby satisfy the provisions of the law and associated regulations and policies. This option was chosen because it makes the state regulations administratively correct and meets the purpose of the regulation: to effectively and efficiently protect public health and welfare,

2. Make alternative regulatory changes to those required by the provisions of the law and associated regulations and policies. This option was not chosen because an amended Chapter 500 would still be either unusable or unnecessary, would not meet the Clean Air Act Title V requirements, would conflict with the effective federal operating permit program requirements in 9VAC5 Chapter 80, and would conflict with federal regulations (40 CFR Part 70).

3. Take no action to amend the regulations and continue to keep the 9VAC5 Chapter 500 requirements effective. This option was not chosen because Chapter 500 is unusable, does not meet the Clean Air Act Title V requirements, conflicts with the effective federal operating permit program requirements in 9VAC5 Chapter 80, and conflicts with federal regulations (40 CFR Part 70).

Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: (1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; (2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one’s spouse, and one’s children and/or elderly parents; (3) strengthen or erode the marital commitment; and (4) increase or decrease disposable family income.

It is not anticipated that these regulation amendments will have a direct impact on families.

Detail of changes

Please detail all changes that are being proposed and the consequences of the proposed changes. If the proposed regulation is a new chapter, describe the difference between the requirements of the new provisions and the current practice or if applicable, the requirements of other existing regulations in place.

If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all provisions of the new regulation or changes made to existing regulations between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
Chapter 500, Part I Definitions.			
500-10		General information, such as meanings for defined and undefined terms.	Repeal. Underlying federal policy has expired. Conflicts with federal and state requirements.
500-20		Definitions.	Repeal. Underlying federal policy has expired. Conflicts with federal and state requirements.
Part II, General Provisions.			
500-30		Purpose.	Repeal. Underlying federal policy has expired. Conflicts with federal and state requirements.

500-40		Applicability.	Repeal. Underlying federal policy has expired. Conflicts with federal and state requirements.
500-50		General requirements.	Repeal. Underlying federal policy has expired. Conflicts with federal and state requirements.
500-60		Existence of permit is no defense.	Repeal. Underlying federal policy has expired. Conflicts with federal and state requirements.
500-70		Circumvention.	Repeal. Underlying federal policy has expired. Conflicts with federal and state requirements.
500-80		Enforcement of a general permit.	Repeal. Underlying federal policy has expired. Conflicts with federal and state requirements.
Part III, General Permit Administrative Procedures.			
500-90		Requirements for department issuance of authority to operate under the general permit.	Repeal. Underlying federal policy has expired. Conflicts with federal and state requirements.
500-100		Applications for coverage under the general permit.	Repeal. Underlying federal policy has expired. Conflicts with federal and state requirements.
500-110		Required application information.	Repeal. Underlying federal policy has expired. Conflicts with federal and state requirements.
500-120		General permit content.	Repeal. Underlying federal policy has expired. Conflicts with federal and state requirements.
500-130		Issuance of an authorization to operate under the general permit.	Repeal. Underlying federal policy has expired. Conflicts with federal and state requirements.
500-140		Transfer of authorizations to operate under the general permit.	Repeal. Underlying federal policy has expired. Conflicts with federal and state requirements.
Part IV, General Permit Terms and Conditions.			
500-150		Emissions levels and requirements.	Repeal. Underlying federal policy has expired. Conflicts with federal and state requirements.
500-160		Emissions levels.	Repeal. Underlying federal policy has expired. Conflicts with federal and state requirements.
500-170		Compliance determination and verification by emission testing.	Repeal. Underlying federal policy has expired. Conflicts with federal and state requirements.
500-180		Compliance determination and verification by emission monitoring.	Repeal. Underlying federal policy has expired. Conflicts with federal and state requirements.
500-190		Recordkeeping requirements.	Repeal. Underlying federal policy has expired. Conflicts with federal and state requirements.
500-200		Reporting requirements.	Repeal. Underlying federal policy has expired. Conflicts with federal and state requirements.

500-210		Compliance certifications.	Repeal. Underlying federal policy has expired. Conflicts with federal and state requirements.
500-220		Consequences of failure to remain below emissions levels.	Repeal. Underlying federal policy has expired. Conflicts with federal and state requirements.
500-230		Enforcement.	Repeal. Underlying federal policy has expired. Conflicts with federal and state requirements.
500-240		Review and evaluation of regulation.	Repeal. Underlying federal policy has expired. Conflicts with federal and state requirements.
FORMS (9VAC5-500)		Exclusionary General Air Permit Document Certification Form, April 24, 1997.	Repeal. Underlying federal policy has expired. Conflicts with federal and state requirements.

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